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No. 10-150

Supreme Court, U.S.
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In The
Supreme Court of the United States

BRUCE CARNEIL WEBSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE ADVOCATES FOR HUMAN RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

THOMAS S. FRASER
Counsel of Record
STEVEN Z. KAPLAN
EDWARD Q CASSIDY
NICOLE M. MOEN
FREDRIKSON & BYRON, PA
200 S. 6th Street, Suite 4000
Minneapolis, MN 55402
(612) 492-7000
tfraser@fredlaw.com

Counsel for Amicus Curiae

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INTEREST OF THE AMICUS

The Advocates for Human Rights is a nongovernmental, nonprofit organization dedicated to the promotion and protection of human rights. Founded in 1983, The Advocates for Human Rights has more than 800 volunteers who document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations.

The Advocates organized its Death Penalty Project in 1991 to recruit attorneys to assist death row inmates with their post-conviction appeals. The Advocates' volunteers have provided pro bono representation to dozens of death row inmates in several states and submitted amicus curiae briefs in numerous cases.[1]

The Advocates for Human Rights has a strong interest in ensuring that the mentally retarded are not executed.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the amicus certify that no counsel for a party authored any part of this brief, and no person or entity other than counsel for the amicus has made a monetary contribution to the preparation or submission of this brief The parties were notified ten days prior to the due date of this brief of the intention to file The parties' consents have been filed.

SUMMARY OF ARGUMENT

In violation of the Eighth Amendment and this Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002), the government is poised to execute a man who is mentally retarded. This execution would occur despite the fact that new evidence now proves that Petitioner is mentally retarded and categorically excluded from the death penalty. That new evidence establishes that the Social Security Administration administered IQ and adaptive functioning tests to Petitioner before he committed the crimes in question and that his post-conviction IQ tests were not "faked."

Moreover, it directly impeaches the government's witnesses at the sentencing hearing and the initial habeas proceeding by proving that Petitioner's adaptive functioning level is that of a young child and that school officials had placed Petitioner in special education classes. This new evidence is so compelling that the concurring opinion below concluded that a finding of mental retardation would be "virtually guaranteed" if considered on the merits.

Nonetheless, the Fifth Circuit denied Petitioner's attempt to have the district court consider this newly discovered evidence, concluding that 28 U.S.C. § 2255(h)(1) of the Antiterrorism and Effective Death Penalty Act ("AEPDA") bars Petitioner from filing a "second or successive" application for a habeas writ raising issues with respect to his mental retardation. It ruled that Petitioner had already litigated his mental retardation claim in his "first" habeas

proceeding and that any later effort to prove his claim using newly discovered evidence would be a "second or successive" application that AEDPA bars. This ruling – which the concurrence termed "Kafkaesque" – unconstitutionally sanctioned the denials of the Due Process, Eighth Amendment, Suspension Clause, and 18 U.S.C. § 3596 protections afforded to Petitioner.

This brief addresses the reasons the Petitioner's application for leave to prove his mental retardation in light of the newly obtained evidence is not a prohibited "second or successive" application and why that conclusion is supported both by this Court's prior habeas rulings and the need to avoid a patently unconstitutional execution.

ARGUMENT

When the Court held that it is unconstitutional to execute a mentally retarded person, it based its holding in part on the fact that mentally retarded persons cannot, as a result of their disability, act with the level of moral culpability necessary to impose the death penalty.[2] *Atkins*, *supra*, 306. "Because of their

[2] The term "mentally retarded" or "mental retardation" is no longer the term used by mental health professionals; instead, the preferred term is "person with an intellectual disability" or "person with a developmental disability." *See* Am. Ass'n on Intellectual & Developmental Disabilities, *FAQ on Intellectual Disability – Is intellectual disability the same as mental retardation?*

(Continued on following page)

disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306. All mentally retarded persons are therefore categorically excluded from the death penalty.

Many of the characteristics of mental retardation that led the Court to its holding also affect a defendant's ability to show that he or she is mentally retarded. As a result, a defendant's mental retardation often goes undetected until after trial or later. Unlike the evidence in a typical habeas claim, critical evidence of mental retardation does not decay over time. In addition, the relief sought by a capital defendant claiming mental retardation – commutation to a life sentence – is far less drastic than the relief sought by a typical habeas petitioner – a new trial on both guilt and punishment.

Despite these reasons for excluding the mentally retarded from a capital sentence, the Fifth Circuit

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Why do programs still say mental retardation?, http://www.aamr.org/content_104.cfm. Indeed, the American Association on Mental Retardation, whose definition of "mental retardation" was quoted by *Atkins*, changed its name to the American Association on Intellectual and Developmental Disabilities ("AAIDD") in 2006. *See* Am. Ass'n on Intellectual & Developmental Disabilities, *World's Oldest Organization on Intellectual Disability Has a Progressive New Name* (Nov. 2, 2006), http://www aamr.org/content_1314 cfm. Because much of the relevant authority and case law uses the earlier terminology, however, this amicus brief uses that terminology as well.

held that Petitioner could not bring a second habeas petition showing that he is mentally retarded – even though, as the court noted, Petitioner had recently discovered clear and convincing evidence in the possession of the government that he was mentally retarded and that his execution would be unconstitutional.

The Court should not sanction the unconstitutional execution of a mentally retarded person, and should allow Petitioner the opportunity to show that he is mentally retarded and categorically excluded from the death penalty.

I. A capital defendant's mental retardation may not be immediately recognized by lawyers and the courts.

A. Mentally retarded persons have limited capacities to understand the importance of their disability to their defense or communicate regarding their disability to defense counsel or the court.

The Court declared in *Atkins* that a defendant's mental retardation "can jeopardize the reliability and fairness of capital proceedings" because it incapacitates that defendant from providing the same level of assistance to the defense as other defendants. *Atkins*, *supra*, 306-07, 318.[3] "Mentally retarded defendants

[3] In *Atkins*, the Court quoted the 1992 definition of mental retardation by the AAIDD. In 2002, the AAIDD updated the

(Continued on following page)

may be less able to give meaningful assistance to their counsel" because they "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[4] *Id.* at 318, 320-21 (citing J. McGee & F. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in The Criminal Justice System and Mental Retardation 55, 58-60 (R. Conley, R. Luckasson, & G. Bouthilet eds. 1992); Appelbaum & Appelbaum, *Criminal-Justice Related Competencies in Defendants with Mental Retardation*, 14 J. of Psychiatry & L. 483, 487-89 (Winter 1994)).

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definition to recognize that the ten specific examples of adaptive skills listed in the 1992 definition fall into three groups of cognitive, social, and practical skills Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v Virginia. How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U RICH. L. REV. 811, 820 (2007) [hereinafter *Challenge*]. The AAIDD now defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills. The disability originates before age 18 " Am. Ass'n on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Support*, 5 (Ruth A. Luckasson et al., eds., 10th ed. 2002)

[4] Not only are mentally retarded defendants less likely to assist in their defense, they also have a greater tendency to make false confessions. *See Atkins*, 321 n 25 (noting that mentally retarded persons have a higher risk of making a false confession) (citing Peter Baker, *Death-Row Inmate Gets Clemency; Agreement Ends Days of Suspense*, Washington Post, Jan. 15, 1994, p. A1)

Ironically, the disability itself makes it difficult for a mentally retarded defendant to understand the relevance of that disability in capital proceedings. Mental retardation also hinders defendants' ability to communicate the fact of their mental retardation to defense counsel or the court. They also may not be able to understand that, if they are convicted of a capital crime, their mental retardation would literally mean the difference between life and death.

B. Mentally retarded persons typically hide their disability from others.

This problem is compounded by the fact that mentally retarded persons typically attempt to hide their disability from others – even defense counsel in capital proceedings. Persons with mental retardation typically attempt to conceal the fact that they are mentally retarded behind a "mask" or a "cloak of competence" in order to appear that they are more competent than they are. *See* Denis W. Keyes, William J. Edwards & Timothy J. Derning, *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REV. 529, 530 (1998) [hereinafter *Invisible Defendant*] ("It is rarely considered by lawyers and judges that people with mental retardation will attempt to hide their disability."); *see also* LaJuana Davis, *Intelligence Testing and Atkins: Considerations for Appellate Courts and Appellate Lawyer*, 5 J. APP. PRAC. & PROCESS 297, 305 (Fall 2003) [hereinafter *Intelligence Testing*]; James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants, in Symposium on the ABA Criminal Justice Mental*

Health Standards, 53 GEO. WASH. L. REV. 414, 430-32 (1985) [hereinafter *Symposium*]; Rebecca J. Covarrubias, *Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, SCHOLAR: ST. MARY'S LAW REVIEW ON MINORITY ISSUES, 11 SCHOLAR 413, 440-42 (Spring 2009); Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation*, 28 HUM. RTS. 9, 11 (2001), *available at* http://www.abanet.org/irr/hr/summer01/fellner.html ("Many people who have cognitive impairments go to great lengths to mask them, wrapping themselves in a 'cloak of competence.'"); Diane Courselle, Mark Watt & Donna Sheen, *Suspects, Defendants, and Offenders with Mental Retardation in Wyoming*, 1 WYO. L. REV. 1, 23 (2001) (stating that the mentally retarded will use a cloak of competency to try to appear more competent than they are).

Mentally retarded persons try to hide their disability because they are aware of the social stigma and want to avoid being labeled as mentally retarded. *Invisible Defendant*, 530. In addition, mentally retarded persons may try to hide the fact of their disability because they are afraid others will then attempt to take advantage of them. *See Invisible Defendant*, 530; *Intelligence Testing*, 305 ("masking can be an understandable response to a sometimes dangerous and exploitative world").

Of course, a mentally retarded capital defendant who engages in the typical behavior of trying to hide his or her disability is acting against his or her self

interest, and is effectively "cheating to lose," because the defendant with mental retardation deflects attention from his or her disability rather than bringing it to the attention of defense counsel or the court. *See Invisible Defendant*, 530; *Intelligence Testing*, 305-06.

C. Most mentally retarded persons have some life skills, making it difficult for defense counsel or the court to recognize their disability.

Most mentally retarded persons – eighty-five percent – have IQs in the range of 55 to 75.[5] Am. Psych. Assn., *Diagnostic and Statistical Manual of Mental Disorders-Text Revision*, 43 (4th ed., Am. Psych. Press 2000) [hereinafter *DSM-IV-TR*]. These individuals require the least assistance and are most likely to have some life skills and have engaged in some "normal life" activities.[6] *See Intelligence Testing*, 304; *Invisible Defendant*, 530.

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[5] It is estimated that only three percent of the general population is mentally retarded. *See Invisible Defendant*, 530 (noting that compared to their age peers, an individual with mental retardation scores lower than 97 percent of the general population on IQ tests).

[6] As such, these individuals present the greatest obstacle to lawyers, the criminal justice system, and even their own defense, because they are most likely to avoid being recognized as mentally retarded. *See Invisible Defendant*, 530; *see also Intelligence Testing*, 303.

Persons with mental retardation "may, with appropriate training and opportunities, develop good adaptive skills in other domains." *DSM-IV-TR*, 47; *see also Intelligence Testing*, 305 (citing same). Thus, the fact that a mentally retarded person has some strengths or life skills does not mean that the person is not mentally retarded. *Intelligence Testing*, 305. Further, the appearance of a particular person's ability to function in a life skill area does not necessarily mean that he or she has complete command of that skill or has mastered the necessary related skills. *Intelligence Testing*, 305.

Although the criminal justice system today has a better understanding of mental retardation than it did when *Atkins* was decided, many court decisions up to and shortly after *Atkins* relied on an outmoded and inaccurate belief regarding mental retardation. Courts often found that a defendant was not mentally retarded because the defendant had some life skills or engaged in certain areas of "normal" life, such as obtaining a GED, having a job, or getting married. *See, e.g.*, *Emmett v. Commonwealth*, 569 S.E.2d 39, 47 (Va. 2002); *Morrisette v. Commonwealth*, 569 S.E.2d 47, 56 n.8 (Va. 2002); *Ex Parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002); *see also Intelligence Testing*, 305 n.56-58 (citing same).

Mental retardation is, however, "always a severe disability." *Invisible Defendant*, 532. In the years since *Atkins*, the criminal justice system has become far better educated regarding mental retardation. Lawyers and judges are more likely to understand

that the mere ability to perform some life task does not mean that the person is not mentally retarded.

Here, Petitioner has never had an evidentiary hearing on the issue of mental retardation based on the newly discovered evidence or the understanding of mental retardation that has developed since *Atkins*.

II. Habeas cases involving a categorical exclusion from the death penalty for mental retardation do not present the judicial and administrative concerns present in typical habeas cases.

Habeas cases involving a categorical exclusion from the death penalty for mental retardation are different from the typical death penalty habeas case. Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 331 (2009-2010) [hereinafter *Death Ineligibility*]. They arise under different circumstances that are unique to that group of defendants, and their cases do not present the same judicial or administrative concerns involved in second or successive petitions from the typical death penalty case. Consequently, habeas cases involving a categorical exclusion from the death penalty for mental retardation should be treated differently from the typical habeas case.

A. Critical evidence of mental retardation does not decay and may improve over time.

One area in which cases involving mental retardation as a categorical exclusion from the death penalty are different from the typical habeas case is that critical evidence regarding whether the defendant is mentally retarded does not deteriorate over time. *Death Ineligibility*, 349. Such evidence of mental retardation often includes school records, medical records, and other state and federal agency records that are highly reliable. *Death Ineligibility*, 362. School records may reflect that a defendant was doing poorly in school or was enrolled in special education classes. *Death Ineligibility*, 362. Many health care records and measures will (or should) contain information addressing mental health issues, level of intelligence and adaptive behavior. *See* Victor R. Scarano, M.D., J.D. & Bryan A. Liang, M.D., Ph.D., J.D., *Mental Retardation and Criminal Justice: Atkins, the Mentally Retarded, and Psychiatric Methods for the Criminal Defense Attorney*, 4 HOUS. J. HEALTH L. & POL'Y 285, 293-94 (2004) (citing *Child and Adolescent Psychiatry: A Comprehensive Textbook*, 1-9, 374-82, 989-1005 (Melvin Lewis ed., 2d ed. 1996)). Medical records may show that a defendant has a hereditary or genetic impairment, such as Down's syndrome, or that a defendant suffered from alterations of the embryonic environment or pregnancy or perinatal problems. *Id.*

The results of IQ tests are another important piece of evidence in assessing whether a defendant is mentally retarded. *Death Ineligibility*, 362. IQ tests, regardless of whether they were administered before or after the crime took place, may yield valuable information regarding whether a defendant is mentally retarded. Moreover, as the relevant psychological and medical fields advance, IQ testing and evaluation of mental retardation of a defendant are likely to improve and become more accurate. *See Death Ineligibility*, 362; *Challenge*, 854-55.

School and medical records, similar to a previously-administered IQ test, are not subject to evidentiary decay in the same way as evidence in the typical habeas case. For instance, a petitioner in a typical habeas case may raise a claim of illegal search and seizure, or failure to give *Miranda* warnings. In those cases, Congress may have justifiably been concerned about a police officer's ability to remember what he or she said or did. *See Death Ineligibility*, 361-62 (citing Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 147 (1970)).

In contrast to typical habeas cases, much of the critical evidence in a mental retardation case – school

or health records, government agency records, IQ test results – does not depend on or consist of witnesses or their recollections.[7] The defendant and the government in that case would have the same ability to present and rebut that evidence regardless of whether that evidence was produced before trial or long afterward.

B. A capital defendant seeking to establish that he is mentally retarded requests the relief of an evidentiary hearing and a commuted sentence – not a whole new trial and release.

A defendant seeking to establish that he or she is mentally retarded and categorically excluded from the death penalty, however, does not request a whole new trial. At most, the defendant seeks an evidentiary hearing to address the mental retardation claim based upon objective evidence. *See Death Ineligibility*, 363. Further, if the defendant fully prevails on his mental retardation claim, the relief is limited to commuting the death sentence to life in prison. *See Death Ineligibility*, 363.

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[7] Any concern that a capital defendant might engage in "sandbagging" by withholding potentially meritorious habeas claims would not apply to claims of mental retardation. *See Death Ineligibility*, 362 (citing *Collateral Attack*, 157-59). A mentally retarded defendant has no incentive to withhold the claim and the evidence of mental retardation does not decay over time. *See Death Ineligibility*, 363.

C. A defendant's challenge to imposition of the death penalty on the basis of mental retardation is a substantive challenge to availability of the death penalty – not a procedural challenge to alleged errors in the original proceeding.

The typical habeas case often turns on alleged procedural violations that may not have affected the outcome of the original proceeding and that have little to any impact on the guilt of the offender. *See Death Ineligibility*, 364.

In contrast, a capital defendant seeking to establish ineligibility for the death penalty because of mental retardation is not bringing a procedural challenge, but is instead challenging a substantive prerequisite for the imposition of the death penalty. *See Death Ineligibility*, 364 (noting that "ineligibility challenges are not procedural").

III. The Fifth Circuit's overly narrow reading of AEDPA undermines *Atkins*, because it would bar petitions based on the same reasons that this Court held warranted categorical exclusion of mentally retarded defendants from the death penalty.

The Fifth Circuit's overly narrow reading of AEDPA undermines *Atkins*, because it would bar petitions based on the very characteristics of mental retardation that this Court held warranted categorical exclusion of mentally retarded defendants from

the death penalty. Congress surely did not intend such a result, and the Constitution does not sanction it.

For mentally retarded defendants, their diminished capacities to understand or communicate may result in their disability going unrecognized, or in key evidence of the disability going uncovered, until later. *See supra* Section I. Here, although evidence of Petitioner's mental retardation was presented earlier, the addition of the newly discovered evidence now renders a finding of mental retardation "virtually guaranteed," according to the concurrence below. Given the effect of mental retardation on the ability to raise a defense and uncover key evidence, a petitioner should not be barred from bringing a petition to show that he is mentally retarded and therefore categorically excluded from the death penalty.

IV. Executing Petitioner would result in an unconstitutional suspension of the writ of habeas corpus.

The suspension clause states that the "privilege of the Writ of Habeas Corpus shall not be suspended unless when in the case of rebellion or invasion the public safety may require it." U.S. Const., art. 1, § 9, cl. 2.

In *Immigration and Naturalization Services v. St. Cyr*, 533 U.S. 289 (2001), this Court considered the procedural effect of the Immigration and Naturalization Act of 1996 on the availability of

habeas corpus jurisdiction for a permanent resident alien who had filed a petition seeking review of a decision from a Board of Immigration Appeals. The District Court and Court of Appeals agreed that it had jurisdiction to hear the petition. The INS argued that the 1996 Act stripped the courts of jurisdiction to hear the petition. This Court affirmed, relying on canons of statutory construction:

> First, as a general matter when a particular interpretation of a statute invokes the outer limit of Congress's power, we expect a clear indication that Congress intended that result. Second, if an otherwise acceptable construction of a statute would raise serious constitutional problems and where an alternative interpretation of the statute is "fairly possible," we are obligated to construe the statute to avoid such problems.

Id. at 300 (internal citations omitted).

In *Felker v. Turpin*, 518 U.S. 651 (1996) the petitioner requested a new trial based on *Brady* violations, ineffective assistance of counsel, and related issues. There was no claim that the petitioner was constitutionally ineligible for execution. This Court denied the petition in *Felker*, holding that the restrictions on successive of habeas corpus petitions did not amount to an unconstitutional suspension of the Writ. The Court noted that AEDPA was part of "an evolving body of equitable principles informed and controlled by historical usage, statutory developments and judicial decision." *Id.* at 664 (citing

McCleskey v. Zant, 499 U.S. 467 (1991)). In denying the petition, this Court held:

> The added restrictions which the Act places on the second habeas petitions are well within the compass of this evolutionary process and we hold that they do not amount to a "suspension of the Writ" contrary to Article 1, § 9.

Id. at 665; *see also Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) ("Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that *some other condition of eligibility had not been met.*") (emphasis added). So the issue remains: Whether, as applied, the AEDPA restrictions cited by the Fifth Circuit barring Petitioner's successive petition amount to a suspension of the Writ contrary to Article 1, § 9.

Here, executing a petitioner who, by the government's own records, is mentally retarded, allows Congress to effect an unconstitutional suspension of habeas corpus. It is therefore reasonable to construe the statute assuming that Congress intended to preserve habeas corpus jurisdiction in cases where a successive Petition would prevent an unconstitutional execution. Otherwise, as exemplified by the Fifth Circuit's reasoning, the courts cede to Congress the power to allow an execution categorically prohibited by the Constitution.

CONCLUSION

Post-*Atkins* developments in understanding mental retardation show that it is often hidden, through no fault of the defendant, in capital proceedings. This reality, unique to mental retardation cases, makes the result below – denial of a successive petition where the evidence of mental retardation lay in the government's own hand – unconscionable and unconstitutional, as the concurrence below noted. This reality warrants grant of certiorari so that this Court can address the denial by the Fifth Circuit Court of Appeals of Petitioner's Motion for Authorization to File a Successive 28 U.S.C. § 2255 Motion. The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS S. FRASER
Counsel Of Record
STEVEN Z. KAPLAN
EDWARD Q. CASSIDY
NICOLE M. MOEN
FREDRIKSON & BYRON, P.A.
200 S. 6th Street
Minneapolis, MN 55402
(612) 492-7000
tfraser@fredlaw.com

Attorneys for Amicus Curiae

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